BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	
Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992	MM Docket No. 92-265
Development of Competition and Diversity in Video Programming Distribution and Carriage	

COMMENTS OF ARTS & ENTERTAINMENT NETWORK

Arts and Entertainment Network ("A&E") files these comments in response to the Notice of Proposed Rule Making ("NPRM") released December 24, 1992 in the above-referenced proceeding. First launched in 1984, A&E is an independent basic cable television network in which no cable operator has an attributable ownership interest. A&E currently is received in approximately 60% of the television households in the United States and is well known for its distinctive mix of quality documentary, performing arts, comedy and dramatic programming.

DISCUSSION

The Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act") amends the Communications Act to add Section 628, which prohibits certain unfair and discriminatory practices in the sale of cable television programming. The NPRM seeks comment on regulations to implement these prohibitions. A&E's comments are limited to one issue that is of great importance to independent program networks -- whether Section 628 reaches (or authorizes the Commission to reach) business relationships that exist between cable operators and those cable programming vendors in which the operator does not have an attributable interest.

In the NPRM, the Commission acknowledges that Section 628's proscriptions regarding satellite cable programming vendors are focused on the practices of vertically integrated entities. The Commission seeks comment, however, on whether this Section "covers conduct beyond actions that are related to discriminatory incentives caused by vertical integration." In this regard, the NPRM notes that while subsections 628(c)(2)(A)-(D) specifically refer to vertically integrated cable operators, subsection 628(b) could be read to apply more broadly to all cable operators regardless of any interest they hold in a programming vendor.[1/]

1/ NPRM at ¶8 and n. 18.

Section 628(b) of the Communications Act, as amended, prohibits a "cable operator" or satellite cable programming vendor in which a cable operator holds an attributable interest from engaging in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming.[2/] Section 628(c)(2) specifies the "[m]inimum contents of [the] regulations" which must be promulgated under Section 628. Specifically, those regulations must:

A. establish safeguards to prevent a cable operator which has an attributable interest in a satellite cable programming vendor from unduly or improperly influencing the decision of that vendor to sell, or the terms of that sale, to any unaffiliated programming distributor;

B. prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest in the prices, terms, and conditions of sale or delivery of satellite cable programming among programming distributors;

C. prohibit practices, understandings, arrangements, and activities, including exclusive contracts, that prevent a programming distributor from obtaining programming from any satellite cable programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator; and

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2/ 47 U.S.C. Sec. 548(b).

D. in areas served by a cable operator, prohibit exclusive contracts for programming between a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest, unless the Commission determines that such contract is in the public interest.[3/]

A&E submits it is manifestly clear from Section 628, from the overall statutory framework of the 1992 Cable Act, and from the Act's legislative history, that Section 628's program access provisions were not intended to apply to cable operators which are not vertically integrated. A contrary reading would not merely contradict the intent of Congress, it would also cause significant harm to independent networks such as A&E.

Initially, the language and structure of Section 628 itself clearly indicate that the provisions therein apply only to operators involved in a vertically integrated relationship with a program vendor. Although subsection (b) does refer to "a cable operator," subsection (c)(2), which prescribes the "[m]inimum contents of regulations" necessary to carry out subsection (b), repeatedly and consistently refers to relationships involving cable operators which hold an attributable interest in a programmer. If Congress had intended Section 628 to reach all cable operators, the minimum specified regulations would not contain these recurring references to vertically integrated operators. Consequently, the more detailed provisions of

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[3/] 47 U.S.C. Sec. 548(c)(2)(A)-(D).

subsection (c)(2)(A)-(D) must be read as controlling the more general introductory statement in subsection (b).[4/]

Furthermore, both Section 628(b) and (c)(2) consistently refer only to those satellite cable program vendors in which a cable operator holds an attributable interest. Thus, Congress clearly intended independent program vendors such as A&E, which lack the incentive to favor one local distributor over another for reasons unrelated to legitimate business concerns, to be free from the program access regulations. Construing Section 628 to reach the programming practices of all cable operators, even in the absence of any vertical integration, would have the effect of subjecting independent program vendors' business relationships to regulation, thereby contravening the statutory goals of the Cable Act and Section 628 -- the promotion of diversity in program services (relying on the marketplace to the maximum extent feasible) and the continued expansion of program offerings to the public.

[4/] In deciding complaints brought under the program access requirements, the Commission will most likely need to use the programming practices of unaffiliated system operators as a means of comparison. Only by such a comparison can the Commission hope to establish whether particular practices result from undue economic leverage or normal market forces. To subject unaffiliated operators to the regulatory regime of Section 628 would effectively eliminate this basis for comparison.

The conclusion that Section 628 was not intended to impose any restrictions on the programming practices of cable operators which do not hold an attributable interest in a programming vendor is reinforced by the overall statutory framework of the 1992 Cable Act. First, Congress clearly could not have intended, by a single, unqualified reference to "a cable operator," to impose a comprehensive regulatory scheme on the program practices of all cable operators, regardless of vertical integration. Nor could this one reference have been intended to authorize the filing of complaints against any operator for any acts or practices which another operator may argue are unfair or deceptive and hinder it from providing programming. On the contrary, such a comprehensive regulatory scheme would have warranted a separate section expressly addressing the requirements imposed.

Second, and even more significantly, Congress generally addressed the program carriage practices of cable operators in another part of the Act, Section 12, which added a new Section 616 to the Communications Act.[5/] It is this statutory section which addresses the possibility of anti-competitive practices by multiple system operators ("MSOs") with regard to unaffiliated program vendors. As the NPRM recognizes, Section 628 primarily restricts the activities of program vendors, while Section 616

5/ 47 U.S.C. Section 536.

restricts the activities of cable operators with respect to program vendors.[6/] Accordingly, it would make no sense for a statutory restriction applicable to all cable operators to be placed among the provisions governing program vendors in Section 628.

Finally, the legislative history of the Cable Act confirms that the Commission should read Section 628(b) to address the program practices of cable system operators only when the practice at issue involves programming provided by a network in which the operator has an attributable ownership interest. For example, the entire discussion of program access regulation in the Senate Report is contained in a section of the Report specifically concerned with vertical integration.[7/] Furthermore, there is nothing in the Conference Report to indicate that the particular provisions of Section 628(b) were intended to be

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[6/] NPRM at ¶54.

[7/] Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 92, 102d Cong., 1st Sess. 25-27 (1991). Although the program access language adopted by the Senate was replaced by the House language in conference, both Senator Hollings and Senator Inouye (two of the principal sponsors of the Senate bill) acknowledged on the Senate floor that the effect of the House and Senate bills was essentially the same. See 138 Cong. Rec. S.14254 (Sept. 21, 1992) (statement of Sen. Hollings); 138 Cong. Rec. S.14224 (Sept. 21, 1992) (statement of Sen. Inouye).

applied to all cable operators regardless of vertical integration.[8/]

CONCLUSION

In short, it is clear from the language of Section 628, from the structure of the Cable Act, and from the statute's legislative history that Congress did not intend to apply Section 628 requirements to all cable operators, whether vertically integrated or not. Such an extension not only would be unjustified, but also would be harmful to the growth and development of independent program networks and thus contrary to the Congressional goals underlying the Cable Act.

Respectfully submitted,

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[8/] In this regard, the comments made on the House floor by Representative Billy Tauzin, the principal author and sponsor of Section 628 are particularly instructive. In introducing the program access language, Rep. Tauzin, stated that "[i]t is this simple. There are only five big cable integrated companies that control it all. My amendment says to those big five, "You cannot refuse to deal anymore." 138 Cong. Rec. H6534 (July 23, 1992) (Statement of Rep. Tauzin).